

No. 20671

In the

United States Court of Appeals

For the Ninth Circuit

ROBERT E. MCCARTHY, Successor to WALTER
E. BECK, as Manager of the United States
Land Office at Sacramento, California,
Appellant,

vs.

LEONARD E. NOREN and HARRY C. PERRY,
Appellees.

Appeal from the United States District Court for the
Southern District of California, Northern Division

Petition for Rehearing

EDSON ABEL

P.O. Box 396
Middletown, California

Attorney for Appellees

FILED

DEC 6 1966

UNITED STATES COURT OF APPEALS

TABLE OF AUTHORITIES CITED

CASES	Pages
American S. & R. Co. v. Maloy, 199 F.2d 52.....	3
Carter v. Powell, 104 F.2d 428, certiorari denied 308 U.S. 611	2
Clark v. Paul Gray, Inc., 306 U.S. 583.....	4
Cover v. Schwartz, 133 F.2d 541.....	2, 4
Donovan v. Esso Shipping Co., 259 F.2d 65, certiorari denied, 359 U.S. 907.....	2, 3
Ford Motor Co. v. NLRB, 305 U.S. 364.....	3
Gannon v. American Airlines, Inc., 251 F.2d 476.....	2, 3
Matson Nav. Co. v. U. S., 284 U.S. 352, 76 L.Ed. 336.....	4
No. Amer. Holding Corp. v. Murdock, 6 N.Y.2d 902, 160 N.E. 2d 926 (1959)	3
Philadelphia Co. v. S. & E. Comm., 84 App. D.C. 73, 175 F.2d 808	3
Stone v. Wyoming Supreme Court, 236 F.2d 275.....	2
Yoder v. Nutrena Mills Inc., 294 F.2d 505.....	3
STATUTE	
28 U.S.C., Section 1292.....	2
TEXTS	
Nichols Cyc. Fed. Proc. (3d Ed.), Sec. 60.94.....	2
2 Am. Jur. 2d p. 671.....	3

No. 20671

In the

United States Court of Appeals

For the Ninth Circuit

ROBERT E. MCCARTHY, Successor to WALTER
E. BECK, as Manager of the United States
Land Office at Sacramento, California,

Appellant,

vs.

LEONARD E. NOREN and HARRY C. PERRY,

Appellees.

Appeal from the United States District Court for the
Southern District of California, Northern Division

Petition for Rehearing

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

Petitioners, appellees herein, respectfully request a rehearing in the above-entitled cause and pray that the Decision herein dated November 8, 1966, be modified and reversed as hereinafter specified and that the appeal herein be dismissed for the reasons and upon the grounds following, to wit:

The Decision of This Court Herein Is Void for Want of Jurisdiction.

(a) The Decision in its entirety is in excess of the jurisdiction of this Court as the Notice of Appeal (R-162) initiating this matter before this Court designates *only* the lower Court's Order of Remand to the Administrative Agency. It reads in part: "the defendants * * * hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order of Remand, entered herein September 17, 1965." Nothing else is designated and it follows that this Court's jurisdiction to review is limited to consideration of the Order of Remand exclusively.

Carter v. Powell, 104 F.2d 428, certiorari denied 308 U.S. 611;

Stone v. Wyoming Supreme Court, 236 F.2d 275;

Gannon v. American Airlines, Inc., 251 F.2d 476, 482;

Cover v. Schwartz, 133 F.2d 541, 546;

Donovan v. Esso Shipping Co., 259 F.2d 65, 68, certiorari denied, 359 U.S. 907;

Nichols Cyc. Fed. Proc. (3d Ed.), Sec. 60.94.

The Notice of Appeal in this instance is definite, specific, certain and unambiguous and has no covert elements serving, lawfully or otherwise, as an avenue for the introduction into this proceeding of matters not within the limited jurisdiction of this Court.

(b) While the Order of Remand is the only action of the District Court designated in the Notice of Appeal, for some reason not apparent, it is not given *any* consideration in the Decision herein.

(c) The Order of Remand to the Administrative Agency in this instance is not within this Court's jurisdiction as it is not an appealable Order under either Section 1291 or Section 1292 of 28 U.S.C. It is not appealable as it is not a

final Order. It merely returns the matter to the Administrative Agency for further hearings, the correction of procedural errors and the making of a new record.

2 Am. Jur. 2d p. 671;

Philadelphia Co. v. S. & E. Comm., 84 App. D.C. 73, 175 F.2d 808;

No. Amer. Holding Corp. v. Murdock, 6 N.Y.2d 902, 160 N.E. 2d 926 (1959).

(d) An Order remanding a matter to an Administrative Agency for the correction of procedural errors is not a final Order.

Ford Motor Co. v. NLRB, 305 U.S. 364, 372.

This decision of the United States Supreme Court involved facts *identical* with those in the instant case and no cogent reasons appear herein to justify rejection of the Supreme Court's appraisal of the procedural situation in the case just cited.

(e) Any Decision rendered or Order entered by a Court in a matter which is in excess of its jurisdiction is a nullity and void.

Yoder v. Nutrena Mills Inc., 294 F.2d 505;

Gannon v. American Airlines, Inc., 251 F.2d 476, 482;

American S. & R. Co. v. Maloy, 199 F.2d 52;

Donovan v. Esso Shipping Co., 259 F.2d 65, 68, certiorari denied, 359 U.S. 907.

(f) A jurisdictional objection may be lodged at any time including for the first time on appeal. Jurisdiction of the subject matter in any proceeding is conferred by law and cannot be given, enlarged or waived by the parties. When want of jurisdiction appears, (whether initially or on appeal) a court must dismiss.

Matson Nav. Co. v. U. S., 284 U.S. 352, 359, 76 L. Ed.
336, 359;

Clark v. Paul Gray, Inc., 306 U.S. 583;

Cover v. Schwartz, 133 F.2d 541, 546.

Respectfully submitted,

EDSON ABEL

Attorney for Appellees

December, 1966

Certificate of Compliance with Rule 23

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to favorable consideration of the Court and that it is not filed for the purpose of delay.

EDSON ABEL

Attorney for Appellees